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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SOUTHERN CALIFORNIA STEEL, et al.,

Plaintiffs and Respondents,

v.

EAST WEST BANK, as Assignee, etc.,

Defendant and Appellant.

B228341

(Los Angeles County Super. Ct. No.
BC424192 and related cases)

APPEAL from an order of the Superior Court of Los Angeles County,
Ramona G. See, Judge. Dismissed.

Anderson, McPharlin & Connors, Jesse S. Hernandez, Arnold Holaday and
Michael A. Verksa for Defendant and Appellant East West Bank.

Feldman & Associates, Inc., Mark A. Feldman and Emily A. Kromke for
Plaintiff and Respondent Compton Steel Co., Inc.

Appellant East West Bank (“EWB”) appeals an order issuing writs of attachment to respondent Compton Steel Co., Inc. (“Compton”) and a number of other parties on the proceeds of a foreclosure sale of real property own by Stanford Regency Plaza LLC (“Stanford”). Compton and other non-appearing respondents, including Wimsatt Contracting Company (“Wimsatt”) had contracts with Stanford to provide certain construction work and materials for a condominium project Stanford was building. A predecessor bank to EWB, United Commercial Bank (“UCB”)¹ agreed to loan Stanford funds to finance the construction of the project and secured the loan with a deed of trust on the property. After Stanford defaulted on the loan and construction on the project was halted, Compton and other subcontractor’s perfected and filed mechanic’s liens on the property and filed various claims against Stanford and EWB (and UCB) in superior court. Thereafter, when EWB attempted to foreclose on the property, Wimsatt filed an application for an ex parte order for injunctive relief or an order issuing a writ of attachment. Compton and other mechanic’s lien holders joined in Wimsatt’s efforts. Ultimately, the lower court issued attachment orders.

Before this court, EWB argues that the lower court erred in issuing the orders of attachment for various reasons. However, shortly before oral argument in this matter, EWB informed this court that a foreclosure sale of the real property had recently occurred, and therefore, EWB maintained that the appeal was effectively moot. As we explain, it does appear that the real property was sold in a foreclosure sale. It further appears that respondents failed to post the required bonds pursuant to Code of Civil Procedure section 489.220, and thus, the writs of attachment were not issued prior to the foreclosure sale. As a result, the matter before this court is moot, and consequently we dismiss the appeal.

¹ In 2009, the California Department of Financial Institutions closed UCB, and the Federal Deposit Insurance Corporation (FDIC) was appointed as the receiver for UCB. Pursuant to an agreement with the FDIC, EWB assumed certain obligations of UCB, including the deed of trust for the Project.

FACTUAL AND PROCEDURAL BACKGROUND

The Project and the Parties. This matter arises out of a construction project to build a large multi-unit condominium complex at 810 East Pico Boulevard in Los Angeles (the “Property”) that was to be known as the Stanford Regency Property (the “Project”). Stanford planned to develop the Project and owned the Property on Pico Boulevard upon which the Project was to be built. In August 2006, Stanford retained a general contractor for the Project and in early February 2007, a subcontractor began demolition work on the Property to prepare the site for construction.

Thereafter on February 27, 2007, UCB agreed to loan Stanford up to \$49.5 million to finance the construction of the Project and secured the loan with a deed of trust on the Property. UCB recorded the deed of trust with the Office of the Los Angeles County Assessor-Recorder on March 13, 2007.

In June 2008, Wimsatt entered into a contract with Stanford to provide concrete, rebar and masonry construction work and materials on the Project. Respondent Compton executed a contract with Stanford in April 2009 to perform steel work for the Project. Compton worked on the Project from April through October 2009.

In October 2009 the Project was shut down and all construction halted. Stanford defaulted on the construction loan. Compton was not paid for its work and in September 2009, it recorded and perfected a mechanic’s lien in the amount of \$525,598.91 on the Property. In October 2009, Wimsatt also recorded a mechanics lien for \$726,317.69 for work on the Project and a number of other subcontractors and material suppliers who performed work on the Property also recorded liens.

In December 2009, Wimsatt filed a complaint against Stanford asserting numerous causes of action against Stanford for among other things breach of contract, foreclosure of the mechanic’s lien, enforcement of the stop notice, quiet title, and declaratory relief. EWB was also named as a defendant in the mechanic’s lien, stop notice, title and declaratory action claims. The complaint anticipated that EWB would seek to conduct a non-judicial foreclosure on the Property and sought to establish the priority of Wimsatt’s mechanic’s lien.

In February 2010 Compton filed its complaint asserting five causes of action for breach of contract against Stanford as well as claims against EWB and Stanford to foreclose on Compton's mechanic's lien. Compton's complaint, Wimsatt's complaint and the complaints of other subcontractors and material suppliers for the Project were related in June and July 2010.

Thereafter EWB initiated non-judicial foreclosure proceedings on the Property under its deed of trust for more than \$43,075,461.75 and served notice of a trustee's sale for August 10, 2010.²

Efforts to Enjoin the Foreclosure Sale and Obtain An Attachment Order.

On August 9, 2010, Wimsatt filed an ex parte application for a temporary restraining order to enjoin the foreclosure sale, or in the alternative an order for a writ of attachment on the proceeds of the foreclosure sale of the Property. Compton filed a notice of joinder of the ex parte order and appeared at the ex parte hearing on August 9, 2010. Counsel for EWB also appeared at the hearing to oppose the request.

In the ex parte motion, Wimsatt argued that EWB had inflated the amount it was entitled to recover on the loan in the foreclosure notice; that Wimsatt's mechanic's lien and the liens of the other subcontractors were senior to the deed of trust because construction began before UCB loaned Stanford the construction funds and before it recorded the deed of trust; and that Stanford and UCB had materially altered the terms of the loan which also would make the deed of trust junior to the mechanic's liens. With respect to the alternative request for an order of attachment, Wimsatt argued that a writ would (assuming that the mechanic's liens are found to be junior to EWB's lien) protect the mechanic's lien holder's interest in the surplus funds from the foreclosure sale—"A writ of attachment to the proceeds accomplishes two compelling goals: (1) it will prevent a windfall to the Bank; and, (2) it will ensure that there is a readily identifiable account from which Wimsatt and other lien claimants can seek payment of their liens once the

² A judicial foreclosure action was also initiated by EWB. (Case No. SC106393.)

Bank proves up its claim for priority and the true unpaid balance of the construction loan.”

After the ex parte hearing, the court ruled that Wimsatt had met the requirements for a Temporary Restraining Order (TRO) based on the preliminary evidence presented indicating that UCB had changed the terms of the loan, such that the deed of trust lost any priority it might have had over the mechanic’s liens. The court granted the application for the TRO and set an Order to Show Cause (OSC) on the request for a preliminary injunction for August 24, 2010. The court further ordered Wimsatt to file and serve its moving papers no later than 4:00 p.m. on August 10, 2010, EWB to file and serve any opposition by noon on August 18, 2010, and Wimsatt to file and serve a reply by August 20, 2010. The court did not impose any deadline for other interested parties to seek joinder in Wimsatt’s motion.

Wimsatt and Compton filed briefs in support of the OSC for the preliminary injunction or in the alternative writ of attachment order, arguing that the work of the contractors began prior to the execution of the construction loan agreement and recording of the deed of trust, and pointing out that Stanford executed the contract with the general contractor well prior to obtaining a construction loan from UCB. Compton also provided the declaration of the subcontractor who conducted the demolition work, who confirmed that the demolition on the site began in early February 2007. Compton argued that the demolition work established the priority of all contractors’ mechanic’s liens over the UCB’s deed of trust.

EWB filed an opposition to the preliminary injunction. EWB argued that Wimsatt and the other subcontractors could not establish that they would suffer irreparable injury if the foreclosure sale proceeded. EWB argued that the priority of the liens was immaterial. Specifically, EWB maintained that if the mechanic’s liens were found to have seniority over the deed of trust the foreclosure sale would not impair their lien rights, i.e., that the purchaser of the Property at the foreclosure sale would take ownership subject to the mechanic’s liens. EWB further argued that if the mechanic’s liens did not have seniority over the deed of trust, the foreclosure sale would extinguish the

mechanic's liens unless surplus funds remained over and above the amount owed to EWB on its senior lien. Consequently, EWB argued that the mechanic's lien claimants had an adequate remedy at law through their causes of action for mechanic's liens or stop notice claims. With respect to the alternative request that the court issue a writ of attachment, EWB asserted, *inter alia*, that pursuant to Code of Civil Procedure section 483.010 because Wimsatt (and the other subcontractors) did not have a direct contract with EWB/UCB they were not entitled to attach the proceeds of the foreclosure sale. EWB argued that Wimsatt's only remedy was to enforce the mechanic's lien or stop notice. EWB also filed objections to the joinders of Southern California Steel, Glendale Plumbing and Fire Supply, Schindler Elevator, Sunpeak Construction, Plaza Wholesale and ABS Technical. EWB complained that none of the subcontractors gave EWB notice that they intended to join in Wimsatt's request for relief before the August 9 hearing on the ex parte application.

On August 24, 2010, the court issued its ruling on the OSC for the preliminary injunction and/or an order issuing a writ of attachment. The court lifted the TRO and denied the preliminary injunction. The court reasoned that although it considered the evidence presented that demolition work commenced prior to the construction loan which could establish priority of the mechanic's lien over the deed of trust, the request for the preliminary injunction failed because Wimsatt had an adequate remedy at law—"even if [Wimsatt] is found to be the senior lien holder through both the mechanic's lien and the stop notice ... provides relief." Nonetheless, the court granted the request for the writ of attachment order, noting that "[t]his request is granted even though there is not privity of contract between the plaintiff Wimsatt and Defendant Bank." The court granted the joinders of Compton, Alcala, Glendale Plumbing and Fire Supply, Southern California Steel, Inc., Plaza Wholesale and Malcolm Drilling. The court further ordered Wimsatt and the joined parties to post an undertaking pursuant to section 489.220. The court also overruled EWB's objection to the joinders.

On September 16, 2010, EWB filed a motion for “Clarification and Correction” of the court’s August 24, 2010 order. In the motion, EWB asked, among various requests, for the court to clarify its ruling with respect the amount of the bond to be posted by each subcontractor, as the court’s order required each contractor to post a bond in an amount far less than the amount sought under the respective mechanic’s liens.

Both Wimsatt and Compton filed oppositions to EWB’s motion. The court denied EWB’s motion for “Clarification and Correction” ruling that:

There are several issues which do warrant clarification. First, the August 24, 2010 writ of attachment order concerned only the attachment of any proceeds from a sale of Stanford Regency Plaza’s property at issue in this case. All of the parties dispute which parties are entitled to priority to these proceeds. Who is entitled to priority to these funds will be determined later in this action.

The court further clarified that separate writs of attachment would be issued upon the posting of each individual bond, and that each party must post a bond for the amount of the total indebtedness of their respective lien claims.³ EWB timely appealed the court’s August 24, 2010 order and subsequent order denying its motion for “Clarification and Correction.” Compton was the only respondent who has filed an appellate brief in this matter.

Foreclosure on the Property

A few days before oral argument on this appeal, EWB sent this court a letter stating that the Property had been sold in a foreclosure sale and that a Trustee’s Deed Upon Sale had been recorded in early March 2012. EWB further represented that it was unaware of any lien claimant posting a bond as required by the lower court as a pre-

³ The court also granted the joinders of Schindler Elevator and Sunpeak Construction, and noted that the court’s file did not contain the joinders of ABS Technical Electric or Pacific Coast Steel.

condition to issuing the attachment orders. EWB opined that the foregoing circumstances rendered this appeal moot.

Thereafter at oral argument, when questioned about whether any party had posted the required bond to perfect the attachment orders, respondent's counsel was unable to identify any such bond that had been posted in the lower court.

DISCUSSION

EWB suggests that events subsequent to the filing of this appeal have rendered it moot. We agree.

The rules governing whether an appeal is moot are well established. "It is settled that 'the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him [or her] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]' [Citations.]" (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 132; see also *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 [case is moot when reviewing court's decision can have no practical impact or provide parties with effectual relief].) Indeed, an action which originally was based on a justiciable controversy cannot be maintained on appeal if all of the questions have become moot by subsequent acts or events. (*Hidden Harbor v. American Fed'n of Musicians Local 325* (1955) 134 Cal.App.2d 399, 402 ["[w]hen a controversy between parties to an appeal ceases to exist, the appeal must be dismissed"].)

Such is the matter before this court. On appeal, EWB's complaint focused on whether the lower court erred in issuing the orders of attachment. The controversy centered on whether respondent Compton and other subcontractors on the Project were entitled to orders attaching the proceeds of any foreclosure sale of the Property. It

appears, however, that neither Compton nor the other lien claimants met the condition precedent for the attachment orders; that is, there is no evidence before this court that any party seeking attachment posted a bond for the amount of the total indebtedness of their respective lien claims. Thus, the orders of attachment were apparently not in effect at the time EWB foreclosed on the Property. Consequently, any controversy with respect to the writs attachment has now ceased to exist. Thus, no justiciable issue remains before this court and the appeal is therefore dismissed.⁴

DISPOSITION

The appeal is dismissed. Each party is responsible for its own costs on appeal.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.

⁴ In reaching this conclusion we do not decide any issues relating to the validity of any mechanic's liens on the Property. Likewise nothing in this opinion should be viewed as determining the validity or priority of any liens or claims on any proceeds from a sale of Property at issue in this case.